

v. 2995

No. 14719

**United States
Court of Appeals
For the Ninth Circuit.**

AUSTIN J. SHELTON,

Appellant,

vs.

GUAM SERVICE GAMES, a Co-Partnership,

Appellee.

Transcript of Record

**Appeal from the District Court, District of Guam
Territory of Guam.**

FILED

JUL 19 1955

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For the Appellant:

SPIEGEL, TURNER & STEVENS, By
ALBERT A. SPIEGEL,
613 Wilshire Blvd.,
Santa Monica, Calif.

TURNER & STEVENS,
Aflague Bldg.,
Agana, Guam.

For the Appellee:

ROBERT E. DUFFY, ESQ.,
Duenas Bldg.,
Agana, Guam.

District Court of Guam
Territory of Guam, Marianas Islands

Civil Case No. 47-54

GUAM SERVICE GAMES, a Co-Partnership,
Plaintiff,

vs.

AUSTIN J. SHELTON,
Defendant.

COMPLAINT FOR SPECIFIC PERFORMANCE
AND DAMAGES

Plaintiff complains of the Defendant and alleges:

1. That the matter in controversy exceeds, exclusive of interest and costs, the sum of Two Thousand (\$2,000.00) Dollars.

2. On or about the 1st day of February, 1954, the Plaintiff entered into a written Agreement with Defendant, a copy of which Agreement is hereto annexed as Exhibit "A," and made a part of this Complaint as though set forth at length herein.

3. That on or about 9 February, 1954. Defendant executed and delivered to Plaintiff a certain written Assignment, supplemental to the Agreement dated 1 February, 1954, hereinabove described, a copy of which Assignment is hereto annexed as Exhibit "B," and made a part hereof as though set forth at length herein.

4. That on or about 9 February, 1954, Plaintiff

executed and delivered to Defendant its Promissory Note in the principal sum of Thirty Thousand (\$30,000) Dollars, payable in monthly installments of Five Thousand (\$5,000.00) Dollars each, a copy of said Promissory Note being hereto annexed as Exhibit "C," and made a part hereof as though set forth at length herein.

5. Plaintiff has, in all respects, complied with the terms of the said Agreement, Assignment and Promissory Note, and is entitled to specific performance of said Agreement by the Defendant.

6. Defendant has violated the terms of the said Agreement in that he has, subsequent to the execution thereof, engaged in the coin operated machines business in the Territory of Guam, other than as an employee of the Plaintiff, and now continues to engage in such business other than as an employee of the Plaintiff herein, to the damage of the Plaintiff in the sum of Fifty Thousand (\$50,000.00) Dollars.

7. That Defendant, in violation of the terms of the said Agreement, has interfered with the business of the Plaintiff, in that he has attempted to discourage customers of the Plaintiff from dealing with the Plaintiff, and has represented himself to customers of the Plaintiff as being entitled to engage in the coin operated machines business, and has attempted to sell or rent coin operated machines to customers of the Plaintiff, and continues to so violate the terms of said written Agreement, to the further damage of the Plaintiff in the sum of Fifty Thousand (\$50,000.00) Dollars.

Whereas, Plaintiff prays:

1. That Defendant be required specifically to perform the said written Agreement and that he, his agents and servants be enjoined during the pendency of this action, and permanently, from in any manner or form, whatsoever, engaging in the coin operated machines business, other than as an employee of the Plaintiff.

2. That Defendant be required to pay to Plaintiff the sum of One Hundred Thousand (\$100,000.00) Dollars for damages Plaintiff has sustained in consequence of Defendant's violations of said Agreement.

3. That Defendant be required to account for and pay to Plaintiff all gains and profits derived by him from the coin operated machines business subsequent to 1 February, 1954.

4. That Defendant be required to deliver up to be impounded during the pendency of this action all coin operated machines in his possession or under his control and that he be required to deliver up, to be impounded during the pendency of this action, all contracts for the purchase or importation into the Territory of Guam of coin operated machines that said Defendant has in his possession or under his control.

5. That Defendant pay to Plaintiff the costs of this action and reasonable attorneys fees to be allowed to the Plaintiff by the Court.

6. That Plaintiff have such other and further relief as to the Court shall seem just.

Dated this 22nd day of July, 1954.

DUFFY & O'CONNOR,
By /s/ R. E. DUFFY,
Attorneys for Plaintiff.

(Copy)

EXHIBIT "A"

Agreement

This Agreement, made and entered into this 1st day of February, 1954, by and between August J. Shelton, of Guam, dba Flamingo Music and Novelty Company, hereinafter called Seller, and Guam Service Games, a partnership registered under the laws of the Territory of Guam, hereinafter called Buyer.

Witnesseth:

That for and in consideration of the mutual promises and undertakings herein set forth, It Is Hereby Agreed by and between the parties as follows:

1. Seller hereby sells, transfers and assigns unto Buyer all of his right, title and interest in and to his Coin Operated Machine business in the Territory of Guam, including all equipment, inventory, supplies, contracts, routes and locations, including the following:

- 21 Seeburg Phonographs
- 29 Pinball Machines
- 5 Skee-Alleys

- 8 Six-Player Bowling Machines
- 1 Rio Bingo Machine
- 6 Electric Guns
- 1 1950 Chevrolet
- 1 1952 1/2-ton pickup truck, Studebaker,

together with miscellaneous parts for the above-named equipment, furniture and office equipment presently owned and used by Seller. It is further agreed that Seller has to his credit, as of the date of this Agreement, accounts receivable in the amount of approximately Six Thousand Five Hundred (\$6,500) Dollars and certain contracts at various location owners amounting to approximately Eight Thousand Five Hundred (\$8,500) Dollars in total value. It is agreed that these accounts receivable and contracts shall pass to the Buyer under this Agreement, or to his assignees, successors, and transferees, forever.

2. Buyer agrees to pay therefor the sum of Fifty Thousand (\$50,000) Dollars, payable as follows: Twenty Thousand (\$20,000) Dollars down, receipt whereof is hereby acknowledged, and the balance payable at the rate of Five Thousand (\$5,000) Dollars per month until fully paid.

3. Seller hereby covenants that he is the true and lawful owner of said property hereinabove sold and transferred, and that the same is free and clear of any and all claims and demands whatsoever, and that he, his heirs, executors, or administrators will at all times hereafter keep and save harmless and indemnify Buyer, his assignees, successors or trans-

ferrees from any and all such claims or demands whatsoever.

4. Seller covenants and agrees to execute all documents, instruments and papers as may become necessary to effectuate the transfer unto Buyer of all equipment, vehicles, contracts and assets herein transferred and sold.

5. Seller hereby covenants and agrees that he will not, within the Territory of Guam, for a period of five (5) years from the date hereof, engage in the coin operated machines business, in any manner or form, whatsoever, whether as owner, partner, agent, employee or otherwise, except as an employee of the Buyer herein. It is further agreed that if the Buyer consents to hire the Seller as an agent or employee then said Buyer will offer to the Seller, as salary, the going normal wage usually paid to persons engaged in similar type of work in the Territory of Guam, at the time of the hiring of the employee; Seller further covenants that he will not interfere, directly or indirectly, in any manner or form with the business of Buyer, his assignees, successors or transferees.

In Witness Whereof, the parties hereto have hereunto affixed their signature the day and year first above set forth.

/s/ AUSTIN J. SHELTON,
Seller.

GUAM SERVICE GAMES, a
Guam Partnership,

By /s/ FLOYD G. BLAKE,
Buyer.

(Copy)

EXHIBIT "B"

Assignment

Whereas, the parties to this assignment have heretofore entered into a contract for the sale of a certain business owned by Mr. Austin J. Shelton to Guam Service Games, a partnership represented by Floyd Blake,

And, Whereas, the said contract contains a clause relating to accounts receivable and location contracts in the amount of Six Thousand Five Hundred (\$6,500) and Eight Thousand Five Hundred (\$8,500) Dollars, respectively.

And, Whereas, the parties to this assignment hereby agree that the figures set forth in the heretofore mentioned contract are incorrect and should read Seven Thousand Nine Hundred Fifty-Six and 56/100 (\$7,956.56) Dollars, and Seven Thousand Dollars (\$7,000), respectively,

And, Whereas, the parties mutually agree that these accounts receivable and contracts shall become the property of Guam Service Games,

Now, Therefore, in consideration of the facts set forth above, and of the mutual promises and covenants of the parties to this Assignment, I hereby assign over to Guam Service Games all of my right, title, and interest in the above-described accounts receivable and location contracts.

The parties hereby mutually agree and stipulate that the assignee covenants and warrants that he

will not sell, lease, or encumber in any way whatsoever, the materials and equipment sold by the said Austin J. Shelton to Guam Service Games until such time as the terms of the contract, and a certain promissory note, dated 9 February, 1954, are fully complied with, or his consent in writing is first procured from Mr. Austin J. Shelton.

Dated at Agana, Guam, this 9th day of February, 1954.

/s/ AUSTIN J. SHELTON,
Assignor;
GUAM SERVICE GAMES,

By /s/ FLOYD G. BLAKE,
Assignee and Partner.

EXHIBIT "C"

(Copy)

9 February, 1954.

Agana, Guam, M.I.

\$30,000.00.

Promissory Note

For value received, six (6) months from date, I promise to pay to the order of Austin J. Shelton the sum of Thirty Thousand (\$30,000) Dollars, without interest. Payments are to be made in monthly increments of Five Thousand (\$5,000) Dollars, each Five Thousand (\$5,000) Dollar increment due and payable on or before the 10th day of each month, with the first payment commencing on the 10th day of March, 1954. In the event of any default in payment of any of the above-mentioned Five Thousand (\$5,000) Dollar increments, and if said default continues for a period in ex-

cess of ten (10) days, then the full balance of the note shall become payable without demand of Austin J. Shelton, or his assignees.

Dated at Agana, Guam, this 9th day of February, 1954.

GUAM SERVICE GAMES,
By /s/ FLOYD G. BLAKE,
Partner.

Witnesses:

/s/ EARL E. KLOPPENBERG,
/s/ B. G. CARLSON.

[Endorsed]: Filed July 23, 1954.

[Title of District Court and Cause.]

MOTION FOR TEMPORARY INJUNCTION

Plaintiff, Guam Service Games, a co-partnership, moves the Court for an order enjoining the Defendant, during the pendency of this proceeding, from engaging in the coin-operated machines business in the Territory of Guam, and further enjoining the said Defendant from interfering in any manner with the operations of the Plaintiff in such business.

Dated this 26th day of July, 1954.

DUFFY & O'CONNOR,
By /s/ R. E. DUFFY,
Attorneys for Plaintiff.

NOTICE OF MOTION

To: J W. Davis, Attorney for Austin J. Shelton.

You will please take notice that the undersigned will bring the above Motion on for hearing before this Court, in the Guam Congress Building, City of Agana, Territory of Guam, on the 30th day of July, 1954, at 9:30 in the forenoon of that date or as soon thereafter as Counsel can be heard.

DUFFY & O'CONNOR,

By /s/ R. E. DUFFY,

Attorneys for Plaintiff.

AFFIDAVIT

Floyd G. Blake, being first duly sworn on oath, deposes and says:

That he is a co-owner of Guam Service Games, a co-partnership, Plaintiff in the above cause of action.

That Defendant, Austin J. Shelton, is engaging in the coin-operated machine business in the Territory of Guam, and is interfering with the coin-operated machine business of the Plaintiff, in violation of a written agreement.

That these acts on the part of the Defendant seriously threaten the welfare of the business of the Plaintiff, are causing irreparable damage to the Plaintiff and are causing great monetary loss to the Plaintiff.

/s/ FLOYD G. BLAKE.

Subscribed and Sworn to before me this 13th day of August, 1954.

[Seal] /s/ [Indistinguishable],
Deputy Clerk of the District
Court.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 29, 1954.

District Court of Guam
Territory of Guam, Marianas Islands
GUAM SERVICE GAMES, a Co-Partnership,
Plaintiff,
vs.
AUSTIN J. SHELTON,
Defendant.

Civil Case No. 47-54

MOTION

Plaintiff, Guam Service Games, a co-partnership, moves the Court for leave to pay or deposit with the Court the sum of Five Thousand (\$5,000.00) Dollars, representing the balance of moneys due from Plaintiff to Defendant under a certain agreement, subject of this suit, between Plaintiff and Defendant and dated February 1, 1954, such deposit to remain with the Court pending determination of the claim of Plaintiff for damages in this proceeding and for an Order of Court determining

such payment to be in full compliance with the terms of said agreement.

Dated this 11th day of August, 1954.

DUFFY & O'CONNOR,
By /s/ R. E. DUFFY,
Attorneys for Plaintiff.

NOTICE OF MOTION

To: J. W. Davis, Attorney for Austin J. Shelton.

You will please take notice that the undersigned will bring the above Motion on for hearing before this Court in the Guam Congress Building, City of Agana, Territory of Guam, on the 20th day of August, 1954, at 9:30 in the forenoon of that date or as soon thereafter as Counsel can be heard.

DUFFY & O'CONNOR,
By /s/ R. E. DUFFY,
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 11, 1954.

APPEARANCE AND ANSWER

Comes now the defendant by his attorney, J. W. Davis, enters his appearance and for reply to the complaint herein filed represents as follows, to wit:

I.

Neither admits nor denies the allegations of paragraph 1 of the said complaint, but requires strict proof thereof.

II.

Admits the allegations of paragraph 2 of the said complaint.

III.

Admits the allegation of a supplementary agreement set forth in paragraph 3 of the said complaint but requires strict proof of that portion of the allegation in connection with execution and delivery.

IV.

Admits the allegations of paragraph 4 of the said complaint.

V.

Expressly denies the allegations of paragraph 5 of the said complaint.

VI.

Expressly denies the allegations of paragraph 6 of the said complaint.

VII.

Expressly denies the allegations of paragraph 7 of the said complaint.

VIII.

Defendant respectfully represents in the nature of an affirmative answer that plaintiff, contrary to the allegations of the complaint, violated the terms set forth in the agreement and assignment, and that the plaintiff therefore comes into court with unclean hands.

IX.

Defendant complains against the prayer as a part

of the said complaint in that the amount of damages requested is in excess of that shown on the face of the complaint, and requests that certain immediate and emergency steps and orders be taken and issued by the court, request for the same and prayer for the same not being in due form.

Wherefore, defendant prays that the prayer of the said complaint be made proper.

Dated this 14th day of August, 1954, at Agana, Guam.

/s/ J. W. DAVIS,
Attorney for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 14, 1954.

[Title of District Court and Cause.]

MOTION

Comes now the defendant by his attorney, J. W. Davis, and respectfully moves this Honorable Court as follows:

That this Court by its Presiding Judge, Paul D. Shriver, declare itself disqualified to try the above-captioned civil action.

That the Honorable Paul D. Shriver disqualify himself for the purpose and purposes of the trial of the above-captioned civil action.

That the Honorable Judge sitting as trier of facts and determiner of law has clearly indicated during a hearing on motion for temporary injunction that he is highly prejudiced against the defendant in the above-captioned action.

That the record before this Court on the motion of plaintiff served on defendant on July 27, 1954, the Honorable Judge, Paul D. Shriver, sitting as trier of facts and determiner of law did clearly state that defendant was guilty of those alleged facts in the complaint filed by plaintiff herein which opinion, finding and judgment clearly indicates such a completely prejudiced attitude and finding that defendant feels compelled to file this motion.

This motion is also made because the remarks, expressed opinions, recorded findings and decision of the Court were made prior to even the joining of issues in the above-captioned matter inasmuch as at the time of the arguing and discussion of the motion the appearance and answer of the defendant to the complaint filed was not a matter of record.

Wherefore, defendant respectfully moves that this Honorable Court declare itself disqualified to hear the trial of such issues as may be joined and that a change of venue be ordered.

/s/ J. W. DAVIS,

Attorney for Defendant.

[Endorsed]: Filed August 16, 1954.

[Title of District Court and Cause.]

ORDER OF INJUNCTION

And Now on this 13th day of August, 1954, this matter having come on for hearing on the Motion of Plaintiff for an Order enjoining the Defendant

during the pendency of this proceeding from engaging in the coin-operated machines business in the Territory of Guam, and the Court having heard testimony adduced in open Court, both parties being present and represented by Counsel, and being now fully advised in the premises,

It Is Therefore Ordered, Adjudged and Decreed by the Court that the Defendant, Austin J. Shelton, be and he is herewith and forthwith enjoined, until the further Order of this Court, from engaging in the coin-operated machines business in the Territory of Guam, in any manner or form whatsoever, whether as owner, partner, agent, employee or otherwise.

It Is Further Ordered by the Court that no bond be required of the Plaintiff.

It Is Further Ordered by the Court that Plaintiff be and it is hereby authorized to pay to and deposit with the Clerk of this Court the sum of Five Thousand (\$5,000.00) Dollars representing the balance of moneys due from Plaintiff to Defendant under that certain agreement, subject of this suit, and executed by Plaintiff and Defendant on February 1, 1954, such deposit to remain with the Court pending determination of Plaintiff's claim for damages in this proceeding, and such payment, when made, shall constitute compliance by Plaintiff with the terms of the said agreement.

Entered August 19, 1954.

/s/ PAUL D. SHRIVER,

Judge of the District Court
of Guam.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 19, 1954.

[Title of District Court and Cause.]

ORDER ON MOTION TO DISQUALIFY

The above-entitled defendant, by his counsel, moved the court to disqualify the incumbent judge for prejudice against the defendant.

The motion to disqualify is denied for the following reasons:

1. The court was not previously acquainted with the defendant prior to the defendant's testimony in connection with a motion for a temporary injunction. Any remarks made by the court were made in connection with the defendant's testimony on that occasion.

2. The court knows of no reason why it cannot hear the principal case on its merits and is not conscious of any attitude inconsistent with one of judicial fairness.

Dated and entered this 30th day of August, A.D. 1954.

/s/ PAUL D. SHRIVER,
Judge.

[Endorsed]: Filed August 30, 1954.

[Title of District Court and Cause.]

PRETRIAL ORDER

September 14, A.D. 1954, 9:30 A.M.

I. Pleadings

The plaintiff filed his complaint under date of July 23, 1954, in which it was alleged that the plaintiff and defendant entered into an agreement under the terms of which the defendant sold a coin machine business to the plaintiff for a consideration of \$50,000 and the defendant agreed that he would not engage in the operation of a coin machine business for a period of five years in the Territory of Guam; that the defendant violated this agreement by engaging in such business. The plaintiff seeks damages in the amount of \$100,000, an accounting of profits and that the defendant be enjoined from further violation. A temporary injunction was issued by the court. The defendant filed in effect a general denial and alleged that the plaintiff had violated its agreement by selling some of the machines without the defendant's permission.

II. Discussion at Conference

At the pretrial conference it developed that the plaintiff contends that after the agreement was entered into the defendant continued to operate a coin machine business through the device of having his wife enter such business while the defendant actually operated the same. The defendant contended that he was merely assisting his wife in the

operation of her business and that the plaintiff first breached the agreement by selling part of the property.

At a preliminary hearing the court enjoined the defendant from continuing his competition and further ordered that the final payment of the consideration for the agreement should be paid into the court pending disposition of the action upon its merits.

III. Witnesses for Plaintiff

1. Floyd Blake, a co-partner of the plaintiff, will testify that subsequent to the agreement entered into the defendant brought machines into Guam, placed such machines and collected from them in violation of his agreement.

2. Henry Atencio, Joaquin Rivera, Mrs. Illogan, Julia Evasco, a lessee of a bar known as Orchid No. 1, the owner of the Gold Star Cafe, a Mr. Artero and a Mr. Nito all will testify that machines were installed by the defendant who took care of such machines, the amounts of money taken from the machines and the amounts received by the defendant.

3. Arsemio Alvarez will testify as to an agreement entered into between him and the Shelton Music Company after the temporary injunction under the terms of which Alvarez repaired machines, made collections and turned the money over to the Shelton Music Company; that Alvarez has the right to place machines where he wishes and that certain of the machines placed by him were taken from defendant's home and placed in their

locations and that he moved other machines.

4. Frank Navarro, an employee of Alvarez, will testify as to making collections from machines placed by the defendant and turning money over to the Shelton Music Company.

5. A representative of the Government of Guam tax office will testify as to the amount of tax paid by the defendant or the Shelton Music Company subsequent to the agreement which was entered into between the plaintiff and the defendant.

IV. Witnesses for Defendant

1. The defendant will testify that his activities were limited to assisting his wife in the operation of her business.

2. Plaintiff's witnesses, Alvarez and Navarro, will testify that the plaintiff violated his agreement by disposing of machines contrary to the terms of his contract.

3. The defendant's wife will testify that prior to the date of the agreement she had been in the coin-operated machine business and that she is the owner and operator of the Shelton Music Company.

V. Stipulations

It was stipulated that either party may call additional witnesses by notifying the adverse party at least five days before the trial of the names of the witnesses and the expected testimony.

VI. Issues for Trial

1. Whether defendant breached his agreement

not to engage in a competitive business and if so the amount of damages.

2. Whether plaintiff breached the agreement not to dispose of property and if so whether the breach was cured by acceptance of subsequent payments.

VII. ORDER

It is herewith ordered:

The above-entitled action is set for trial October 11, 1954, at 9:30 a.m.

Dated and entered this 14th day of September, A.D. 1954.

/s/ PAUL D. SHRIVER,

Judge.

[Endorsed]: Filed September 14, 1954.

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEY

Defendant, Austin J. Shelton, hereby substitutes Turner & Stevens, of Agana, Guam, as his attorneys in the above-entitled action, in the place and stead of J. W. Davis, of Agana, Guam.

Dated this 8th day of October, 1954.

/s/ AUSTIN J. SHELTON.

I hereby consent to the foregoing substitution.

Dated this 8th day of October, 1954.

/s/ J. W. DAVIS,

TURNER & STEVENS,

By /s/ LYLE H. TURNER.

[Endorsed]: Filed October 13, 1954.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated by and between plaintiff and defendant that the following facts and exhibits hereinafter referred to, and none other, may be taken as proved as though actually testified to at the trial of this action.

1. On the 1st day of February, 1954, plaintiff and defendant entered into a written contract, a copy of which has been introduced as plaintiff's Exhibit "1," and on the 9th day of February, 1954, plaintiff and defendant entered into a written assignment and promissory note, which have been introduced as plaintiff's Exhibits "2" and "3," respectively.

2. By said agreement defendant sold plaintiff all of the assets of his coin-operated machine business in the territory of Guam, known as Flamingo Music and Novelty Company, with principal office in the Municipality of Agaña.

3. Plaintiff was at the time of such sale operating a coin-operated machine business in the territory of Guam, with machines in all municipalities of Guam, except Umatac, Talofoto, Merizo and Inarajan.

4. Defendant delivered to plaintiff all of the consideration under said contract and plaintiff has paid to defendant the sum of \$45,000.00 under said agreement and said promissory note and has deposited in court pursuant to an order of the court

the sum of \$5,000.00, being the last payment due from plaintiff to defendant under the terms of the said note.

5. On the 10th day of May, 1954, defendant's wife secured a license to operate a coin-operated machine business in the territory of Guam and thereafter operated such a business in the territory of Guam, importing such machines, entering into contracts and agreements with commercial establishments in the territory of Guam, and did install the following coin-operated machines in the indicated places of business in the territory of Guam.

Type of Machine	Name of Business	Municipality- Location
Evan's Holiday Juke Box	Halenanea	Agana
Evan's Holiday Juke Box	Fifth Avenue	Agana
Evan's Holiday Juke Box	Artero's	Sinajana
Evan's Constellation and) Bink's Counter (Game)	Cristobal's Store	Barrigada
Seeburg Juke Box and) Bally Bowler)	Gold Star Club	Dededo
Evan's Holiday Juke Box	Chicken House	Agana
Evan's Holiday Juke Box	19th Hole	Barrigada
Bally One Ball Machine	Filipino Corner	Agat
Bink's Counter Game	Tomas Cruz Store	Merizo

6. Defendant was connected with his said wife's business from and after the inception thereof in that he took part in the negotiation of contracts, installation and servicing of machines and the collection of the proceeds of said machines.

7. During the period ensuing from the time defendant's wife installed said machines, plaintiff did not solicit the installation of its machines in

the commercial establishments in which defendant's wife had installed machines.

8. At the time the parties entered into said instruments designated as Exhibits "1," "2," and "3," plaintiff placed a value to it of \$30,000.00 for the physical equipment of defendant's business as then installed and operating in commercial business places, and the defendant placed a value of \$35,000.00 upon said physical equipment, and the contracts and accounts receivable of defendant's business were jointly agreed upon as having the following values:

Accounts Receivable	\$ 7,956.56
Contracts	7,000.00
	—————
Sub-total	\$14,956.56

9. Plaintiff is unable to prove an actual monetary loss as a result of defendant's actions, as aforesaid, but claims damage for breach of the agreement. Plaintiff has contracted for and incurred attorney's fees in the sum of \$1,500.00 in this action, and claims such attorney's expenses as a damage resulting from breach of the agreement.

10. That since the Spanish times in Guam, the Island has been geographically divided into municipalities; that attached hereto marked Defendant's Exhibit "A," is a map showing the historic development of such geographic municipalities; that the map entitled municipalities as of March 19, 1934, is the present geographic division of Guam into municipalities; that the Municipality of Agana

is shown on said map with the red crayon caption "Agana"; that any other crayon writing on said map shall not be considered as a part of the Exhibit; that certain areas within municipalities have been known as "districts," but have no geographic significance.

11. Plaintiff's counsel shall have twenty days within which to file a brief, and defendant's counsel shall have ten days within which to file a reply brief, the cause to be submitted to the Court for judgment upon the facts stipulated to herein.

Dated: Agana, Guam, this 25th day of October, 1954.

TURNER & STEVENS,
Attorneys for Defendant,

By /s/ LYLE H. TURNER
DUFFY & O'CONNOR,
Attorneys for Plaintiff,

By /s/ ROBERT DUFFY.

[Endorsed]: Filed October 25, 1954.

[Title of District Court and Cause.]

BRIEF FOR PLAINTIFF

Statement of Facts

On October 25, 1954, a stipulation of facts was entered into between Plaintiff and Defendant. The

contract and note, subject of this suit, have been admitted in evidence as Plaintiff's Exhibits Nos. 1 and 3, respectively.

Under the contract, made on February 1, 1954, the Defendant transferred and assigned to the Plaintiff "all of his right, title and interest in and to his Coin-Operated Machine Business in the Territory of Guam, including all equipment, inventory, supplies, contracts, routes and locations, * * * together with miscellaneous parts for the above-named equipment, furniture and office equipment" then owned and used by the Defendant.

Under the stipulation, it is admitted that on May 10, 1954, Defendant's wife secured a license to operate a coin-operated machine business in the Territory of Guam, and thereafter operated such a business, importing such machines, entering into contracts and agreements with commercial establishments, and did install certain such machines in various municipalities in Guam. It is further admitted that defendant was connected with his wife's business from and after the inception thereof, in that he took part in the negotiation of contracts, installation and servicing of machines, and the collection of the proceeds of said machines.

Suit was filed herein on July 23, 1954, requesting specific performance and injunction, and damages for Defendant's violation of the contract, and for costs of action and reasonable attorneys' fees. It is also stipulated that Plaintiff has incurred, in the prosecution of this suit, attorneys' fees in the sum of Fifteen Hundred (\$1,500.00) Dollars.

Legal Questions Presented

Inasmuch as the execution of the contract and the violation of the terms of the contract are admitted, the only remaining questions for legal determination are:

(a) Does the contract fall within the statutory exceptions permitting enforcement of contracts which would otherwise normally be considered as being in restraint of trade? (b) Is the contract valid, insofar as its terms are concerned, relating to the duration of the restraint and the territorial extent of the restraint? (c) Damages allowable to Plaintiff.

Section 1673 of the Civil Code of Guam provides: "Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections is to that extent void."

Section 1674 provides: "One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified district, city, or a part thereof, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein."

There can be no question but that Defendant sold and transferred the goodwill of his business under the instant contract. In the case of *Shafer vs. Sloan*, 3 Cal. App. 335, 85 Pac. 162, the Court held that a written contract to sell "all my right, title and interest in and to the goods, wares and merchandise in my storeroom," agreeing that the

seller should not engage in that type of business, will be construed to carry with it the goodwill of the business. There can be no question, therefore, that the instant contract falls within the exception of Section 1674 of the Civil Code of Guam.

Validity of Contract

Under the old jurisprudence, when trade and the mechanic arts were in their infancy it was deemed a matter of public importance to encourage their growth and to prohibit contracts which tended to abridge them. Hence, the rule then was, that all contracts were void which in any degree tended to the restraint of trade, even in a particular, circumscribed locality, either for a definite period or an unlimited period.

But as trade and commerce increased this stringent rule has ceased and the rule has been relaxed and modified. The early cases of *Wright vs. Ryder*, 36 Cal. 342; *Santa Clara Valley Mill and Lumber Co. vs. Hayes*, 76 Cal. 387; and *California Steam Nav. Co. vs. Wright*, 6 Cal. 258, adopted the doctrine that the contracts to be valid should have a consideration, some good reason for entering into it, and must impose no restraint upon one party which is not beneficial to the other.

Contracts are not contenanaced in which the restraint is confined to reasonable limits of time and place and which are founded upon a sufficient consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and to be limited to what

is fairly necessary, under the circumstances of the particular case, for the protection of the covenantee. Public welfare is first considered, and if it not be involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. *Ghiradelli Co. Hunsicker*, 164 Cal. 355, 128 Pac. 1041; *Grogan vs. Chaffee*, 156 Cal. 611, 105 Pac. 745.

In the case of *Meyers vs. Merillion*, 118 Cal. 352, the Court held that the language of the code is for reasonable construction so as to effect the end for which the legislature says such contracts may be made, and to give reasonable protection to him in whose favor such contract is made.

Duration of the Restraint

Periods of ten (10) years restraint have been held not to be unreasonable so long as the Plaintiff is engaged in the same business. *Franz. vs. Bieler*, 126 Cal. 176; *City Carpet Works vs. Jones*, 102 Cal. 506. And in the case of *Akers vs. Rappe*, 30 Cal. App. 290, the Court held that a contract not to engage in the same business for twenty (20) years in the city in which the business sold was conducted is not void on the ground that the period is unreasonably long.

To What Capacities Restraint Extends

In the case of *Meyers vs. Merillion*, 118 Cal. 352, the Court said: "An inhibition as to agency for others in a contract by one who has sold the goodwill of a business, engaging not to carry on a like business, or act as agent in so doing, is within the provision of the code permitting a contract in re-

straint of trade * * *; and the language of the code is to receive a reasonable construction so as to effect the end for which the legislature says such contracts may be made and to give reasonable protection to him in whose favor such contract is executed, and the code provision as to carrying on similar business is not to be limited to carrying on as owner or proprietor but is equally inclusive of the conduct of it, wholly or in part, as agent of another. A similar opinion was rendered in the case of *Marriman, et al., vs. Menzies*, 115 Cal. 16.

Territorial Extent of Restraint

In *City Carpet Works vs. Jones*, 192 Cal. 506, Defendant covenanted not to engage in the type of business sold for a period of ten (10) years in the City or County of San Francisco, or in the County of Alameda, or in the County of San Mateo. The Court, in holding the Defendant liable for breach of contract held that the test to be applied is whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interests of the public.

In the instant case, the Defendant covenanted not to engage in the coin-operated machine business in the Territory of Guam for a period of five (5) years from the date of the contract, in any manner or form, whatsoever, whether as owner, partner, agent, employee or otherwise, except as an employee of the Plaintiff, and that he would not interfere, directly or indirectly, in any manner or form with the busi-

ness of the Plaintiff, its assignees, successors or transferees.

The code gives no definition of the word "district," as such, as used in Section 1674 above cited. It is true that, as stipulated, certain areas in Guam, within municipalities, have been known, as "districts" but that they have no geographical significance. The decisions of Courts with reference to the interpretation of the meaning of the word vary greatly. In some cases the word has been held not to be synonymous with "county," and in other cases it has been held to be synonymous with "county." *City of Chicago vs. Knobel*, 232 Ill. 112, 83 NE 459; *State vs. O'Brien*, 35 Mont. 482, 90 Pac. 514; *State vs. Mack*, 134 Or. 67, 292 Pac. 306.

The word also has been held interpretive of embracing more than one county. 21 S D 97, 110 NW 36.

As used in Section 14, Article 2 of the State Constitution of New Mexico, "district" is descriptive of the territory which in legal contemplation comprises the visne over which the jurisdiction of the Court for purposes of prosecution for crimes and misdemeanors extends. *State vs. Belles*, 21 N M 16, 172 Pac. 196. It has also been held to be defined and geographic portion of a State, in construing a State Constitution. *Rose vs. Superior Court in and for Imperial County, California*. 252 Pac. 765.

In the Territory of Guam, the "District Court of Guam" has jurisdiction of all matters arising in the Territory under the laws of the United States, and has original jurisdiction in all other causes in the

entire Territory of Guam except those over which original jurisdiction has been transferred to and vested in the Island Court by Public Law 17.

While it is true that Section 1674 of the Civil Code refers to a "specific district, city, or part thereof," it is apparent from the comparison of that section with the same numbered section of the California Code, that the word "district" was used in place of the word "county" as contained in the California Code. With no cases interpreting the meaning of the word "district" as used in the Civil Code of Guam, a reasonable construction must be placed thereon, and it is apparent from the wording of the code that a district is meant to be a larger area than that of a municipality, and inasmuch as it was used to replace the word "county" as used in the California Code, it is also susceptible to the construction of including the entire Territory of Guam or such smaller portion thereof as the parties in the matter, by contract, specify.

Damages

With respect to damages allowable to Plaintiff, it is stipulated that Plaintiff has incurred expenses in the sum of Fifteen Hundred (\$1,500.00) Dollars for the prosecution of this action.

Section 3300 of the Civil Code of Guam provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby * * *."

Section 3301 of the Civil Code of Guam provides:

“No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.”

In many jurisdictions it has been held that counsel fees and other expenses of litigation can be considered as an element of damages only in those cases in which exemplary damages are or can be awarded. However, in many jurisdictions the recovery of attorneys fees and expenses of litigation as a part of the costs is authorized by statute in certain classes of actions or proceedings or against certain classes of persons in actions arising from failure to perform or the violation of statutory or contractual obligations. 15 American Jurisprudence Sec. 146 and cases there cited.

It is contended, therefore, that attorneys fees in the sum of Fifteen Hundred (\$1,500.00) Dollars and costs, are recoverable by the Plaintiff in this action, together with such other damages as the Court may determine to be consistent with the breach of the Defendant.

DUFFY & O'CONNOR,
By /s/ R. E. DUFFY,
Attorneys for Plaintiff.

[Endorsed]: Filed November 27, 1954.

[Title of District Court and Cause.]

DEFENDANT'S REPLY BRIEF

Statement of Facts

This is an action by plaintiff to recover damages resulting in an alleged breach of a contract by the

defendants, and plaintiff has asked for a permanent injunction restraining defendant from future violations. At a preliminary hearing the court granted a temporary injunction.

No trial was actually had, but the facts were stipulated to by plaintiff and defendant and were filed in this cause on the 25th day of October, 1954. The only facts to be considered by the Court are the facts as so stipulated. After the stipulation of facts was entered into, this Honorable Court requested briefs from counsel upon the legal issues involved.

Questions Presented

1. Does the contract fall within the statutory exceptions permitting enforcement of contracts which would otherwise normally be considered as being in restraint of trade?
2. If the contract is valid, what is the validity with respect to the duration and territorial extent of the restraint?
3. What are plaintiff's damages, if any?

Statutes Involved

Civil Code of Guam:

Section 4. Rules of construction. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this territory respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice.

Section 1673. Contracts, restraint of trade. Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void.

Section 1674. Exception, sale of good will. One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified district, city, or a part thereof, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein.

Introduction

Guam is a code jurisdiction and as such, the code provisions establish the law of this territory, see CC Sect. 4, *supra*.

Discussion

I.

Does the contract fall within the statutory exceptions permitting enforcement of contracts which would otherwise normally be considered as being in restraint of trade?

Defendant acknowledges that where, as is the case here, a sale of all of the assets of a business is made, the good will of the business is transferred with the assets and the sale is therefore within the provisions of C.C. 1674, which is an exception to the statutory prohibitions against restraint of trade as set forth in C.C. Section 1673. See *Shafer v. Sloan*, 3 C.A. 335, 85 Pac. 162; *Streeter v. Rush*, 25 Cal. 68.

II.

What is the duration and territorial restraint that is allowable?

Duration of Restraint:

(a) The contract in question provides as follows:

“Seller hereby covenants and agrees that he will not * * * for a period of five (5) years from the date hereof * * *”

C.C. 1674 provides in part that one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business “so long as the buyer or any person deriving title to the good will from him, carries on a like business therein.”

Within the terms of the statute, the period of inhibition by contract may be during the period the buyer, or any person deriving title to the good will from him, carries on a like business. The courts have held that restraint may issue for the period the buyer or any person deriving title to the good will from him carries on the business, not exceeding the period provided for in the contract. (*City Carpet Beating, etc., Works v. Jones*, 102 Cal. 506, 36 Pac. 841, 843.)

(b) Territorial Extent of Restraint:

The Court of Appeals for the Ninth Circuit in the case of *United States v. Johnson* (181 Fed. (2) 577) had occasion to set forth the background of legislative history of the Codes of Guam and reached the

conclusion that they were derived from the Codes of California.

The Civil Code of Guam as adopted in March, 1934, took Sections 1673 and 1674 from the Civil Code of California. Section 1674 was enacted in California in 1872 and at the time of the adoption of the Guam Codes had been unchanged since its original enactment, and then read as follows:

“Any person who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or part thereof so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein.”

Certainly the California legislature intended the limitations to apply to less than the entire state.

The Guam Code as adopted substitutes the term “district” for “county.” The term “county” constitutes a subdivision of a state or, in England, a subdivision of the country. The term “district” means “one of the portions into which an entire state or country, or county, municipality or other political subdivision or geographical territory is divided for judicial, political or administrative purposes,” see *Rose v. Superior Court in and for Imperial County*, 80 Cal. App. 739, 252 Pac. 765, 770. There appears no question that in enacting Section 74 into Guam law, a subdivision of the territory of Guam was intended and contemplated. The substitution of the term “district” for “county” is com-

pletely understandable when we look at the stipulated facts. The term "county" has never been used in Guam for purposes of subdividing the territory. At the time the codes were adopted in Guam, there were "districts" which were definite geographical areas. Although the term "district" has lost some of its actual usage, Guam is still divided into municipalities and subdivided into districts. Although it has lost its precise geographical significance, there is no question that a "district" as used in the statute is a subdivision is lesser part of the territory of Guam and does not include the entire territory.

Plaintiff attempts to establish that the injunction sought may extend to the entire territory of Guam on the theory that the use of the word "district" in the caption of this court, whose jurisdiction extends throughout the territory of Guam, does give a basis for defining the term "district" as used in Section 1674 to include the entire territory of Guam. There is no basis for such construction. Section 1674 was enacted in 1934. The District Court of Guam was created in 1950. Obviously, the intent of the statute at the time of adoption of the Codes cannot be based upon a subsequent enactment, especially when the event occurs sixteen years later.

Furthermore, the caption of this Honorable Court and the area over which its jurisdiction extends was established by an act of the United States Congress and a Federal statute cannot serve as a purpose for determining the interpretation of a territorial code section. The use of the word "district" in the caption of this Court is consistent with the evident

intent of Congress to give a similar name to all Federal courts of first instance and was not an attempt to create a "District" of the territory of Guam for purposes other than to define the territory jurisdiction of this court.

Under modern interpretations where the contract is too embracing with respect to territory, it will be construed to be operative within (in California) the county or portion thereof in which the business is located (*Mahlstedt v. Fugit*, 190 P(2d) 777, 779, and other cases therein cited).

The restraint, if any, imposed herein must be limited to the "district" or "municipality" within defendant's business is located, i.e., Agaña.

In none of the cases on this subject has the factor that the business is necessarily carried on outside the subdivision of the state or territory, been given any consideration. To do so would be in the face of the statute (C C 1674) which sets up only two exceptions to the general prohibition—duration and territorial limitations.

The statute may be outmoded, but the duty of correcting legislation is for the Legislature and for a court to vary the obvious intent and meaning of a statute is to violate the separation of powers doctrine.

III.

What are plaintiff's damages, if any?

By the stipulation of facts, plaintiff is unable to prove any actual damages resulting from a violation, and is therefore only entitled to nominal damages.

Plaintiff claims it is entitled to recover attorney's fees in this action, but the rule is that attorney's fees are only allowed where agreed upon by contract or allowed by statute. (*City of Los Angeles v. Abbott*, 217 Cal. 184, 17 P(2d), 993. See also *Bank of America National Trust & Savings Association v. West End Chemical Co.*, 37 Cal. App. 2d 100 P (2d) 318.) Furthermore, in every case digested on this subject attorney's fees were not a part of the damages awarded. See California cases cited supra under Points II and III. They are not recoverable as costs except as allowed by statute and the statute allows only \$10.00 for each day of actual court attendance.

Respectfully submitted,

TURNER & STEVENS,

Attorneys for Defendant;

By /s/ LYLE H. TURNER.

Dated: December 3, 1954.

[Endorsed]: Filed December 7, 1954.

[Title of District Court and Cause.]

MOTION FOR SHOW CAUSE ORDER

Plaintiff, Guam Service Games, a co-partnership, moves the Court that an Order be entered herein requiring the Defendant, Austin J. Shelton, to appear and show cause why he should not be held in contempt of this Court for violation of the injunc-

tion order of this Court entered herein on 13 August, 1954.

This motion is based upon the files and records of this proceeding and upon the affidavit of Nolan P. Preedit submitted herewith.

Dated this 8th day of December, 1954.

DUFFY & O'CONNOR,
By /s/ R. E. DUFFY,
Attorneys for Plaintiff.

AFFIDAVIT

Nolan P. Preedit, being first duly sworn on oath, deposes and says:

1. That he is a temporary resident of the Territory of Guam, and has resided therein for more than one (1) year last past.

2. That he is acquainted with Austin J. Shelton, Defendant in Civil Case No. 47-54, now pending in the District Court of Guam.

3. That on or about the 10th day of November, 1954, Affiant received a message to the effect that Austin J. Shelton wished to talk with him; that as a result of the receipt of such message, Affiant went to the home of Austin J. Shelton in Agana, Guam, and conferred with him for approximately four (4) hours.

4. That the said Shelton asked Affiant if he would be interested in taking over the coin-operated machine routes for him, the said Shelton, as an employee.

5. That on a later date Affiant brought to the said Shelton a coin-operated music box to be repaired, and that the said Shelton personally repaired the same.

6. That the said Shelton further offered to purchase from the Affiant coin-operated machines owned by Affiant.

7. That Affiant is acquainted with Amanda Shelton, the wife of the said Austin J. Shelton, and that the said Amanda Shelton was not present at any time during the conference between Shelton and Affiant nor at any time during the period that the said Shelton repaired Affiant's coin-operated music box.

Dated at Agana, Guam, this 8th day of December, 1954.

/s/ NOLAN P. PREEDIT.

Subscribed and Sworn to before me this 8th day of December, 1954.

/s/ [Indistinguishable],

Deputy Clerk of the District
Court of Guam.

[Endorsed]: Filed December 8, 1954.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

A Motion having been filed herein by the Plaintiff for an Order requiring the Defendant to show

cause why he should not be held in contempt of Court for failure to abide with a previous Order of Injunction entered herein on 13 August, 1954, and it appearing to the Court from the files and records of this proceeding and from the Affidavit of Nolan P. Preedit attached to said Motion, that Plaintiff is entitled to such Order,

It Is Therefore Ordered, Adjudged and Decreed by the Court that Austin J. Shelton, Defendant, be and he is hereby directed to appear before the District Court of Guam on December 13, 1954, at the hour of 1:30 o'clock p.m. and show cause why he should not be held in contempt of this Court by reason of failure to abide by the terms of the Order of Injunction entered herein on 13 August, 1954.

It is further ordered that a copy of the Motion, Affidavit in support thereof, and a copy of this Order be served on the Defendant, Austin J. Shelton, or upon his Counsel at least three (3) days prior to the date of the said hearing.

Entered this 9th day of December, 1954.

/s/ PAUL D. SHRIVER,
Judge, District Court of
Guam.

[Endorsed]: Filed December 9, 1954.

[Title of District Court and Cause.]

OPINION

The defendant as the then owner of a coin-operated machine business, sold such business, including

all assets, accounts receivable, etc., to the plaintiff, a co-partnership, for a consideration of \$50,000. At the time of sale the defendant agreed that for a period of five years he would not engage in such business as owner, partner, agent, employee or otherwise in the territory of Guam, except as he might be employed by the plaintiff. The defendant breached the agreement by taking advantage of his knowledge and skill to place his wife in the same business and then assisting her to compete with the defendant. He was temporarily enjoined and the final payment due him on the purchase price of the business was ordered paid into court.

The defendant has admitted the breach but contends under Guam law a territory-wide restraint is not authorized, that plaintiff is not entitled to attorney's fees or other than nominal damages for the breach.

The business in question involves the locating of coin-operated machines, mostly juke boxes, in bars, restaurants, stores and other places, where customers by inserting an appropriate coin may hear selected music or play games, replete with clicks, moving lights, scores and similar features to induce those with both coins and time to spend both. The owner of the machines must service them, collect the proceeds and pay either commissions, rentals or both to the proprietors where the machines are placed and, of course, the business flourishes in proportion to the number of machines which can be placed at suitable locations.

There is no question as to the intent of the parties

to prohibit the defendant from competing in the business in Guam for a period of five years. The applicable code provisions are Sections 1673 and 1674 of the Civil Code of Guam.

“1673. Contracts, restraint of trade. Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void.

“1674. Exception, sale of good will. One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified district, city or part thereof, so long as the buyer or any person deriving title to the good will from him carries on a like business therein.” (Underscoring supplied.)

These provisions were taken from the Civil Code of California, as were most Guam Civil Code provisions, and may be construed in the light of California decisions, *United States v. Johnson*, 9 Cir., 181 F. 2d 577. However, the provisions in Section 1674 of the California Code referred to “county, city or part thereof.” This section was subsequently amended after the adoption of the Guam Code and includes “a specified county or counties, city or cities, or a part thereof,” Section 16601, California Business and Professions Code.

The applicable construction of these code provisions is well stated in *Mahlstedt v. Fugit*, 79 C.A. 2d 562, 180 P. 2d 777:

“The law in force at the time the contract was executed became a part of the contract and it is presumed that the parties contracted with knowledge of the law. On the date of the contract sections 1673 and 1674 of the Civil Code were in effect. (These provisions with slight modifications are now sections 16600 and 16601 of the Business and Professions Code.) As authorized by said sections of the Civil Code appellant, having transferred the good will of his business, agreed to refrain from carrying on a similar business for a period of ten years. He contends that that portion of his agreement was void because it did not, as required by section 1674, specify the territory within which he agreed not to carry on his business. If such a contract is indefinite as to time or territory the court will construe it in such manner as to make it valid. If the contract is unrestricted as to the territory in which the seller agreed to refrain from competition with the purchaser of his business, or if it includes more territory than that provided by law it will be construed to be operative within the county or portion thereof in which the business is located (*City Carpet, etc., Works v. Jones*, 102 Cal. 506, 512 [36 P. 841]; *Stephens v. Bean*, 65 Cal. App. 779, 783 [224 P. 1022]; *General Paint Corp. v. Seymour*, 124 Cal. App. 611, 614 [12 P. 2d 990]), and if the agreement is indeterminate as to the period of its operation, or is without time limit, the court will construe it to cover the time per-

mitted by law. (Gregory v. Spieker, 110 Cal. 150, 153 [42 P. 576, 52 Am. St. Rep. 70]; Brown v. Kling, 101 Cal. 295, 298 [35 P. 995].) In the instant case the contract did not specify the territory in which appellant agreed that he would not engage in business. Prior to the sale appellant's business had been carried on in Los Angeles County and after the sale respondent conducted his business in the same county. The court construed the contract to be limited to the territory in which the parties respectively had conducted their businesses and restrained appellant from infringing on respondent's business in Los Angeles County. We find no error in the restraint thus imposed on appellant."

It has been noted that the Guam law refers to "district." There was no county political unit and while the defendant suggests that there were districts in Guam, there is no evidence that districts had any geographical significance. In adopting the California codes by executive fiat, the effort was to bring to Guam a body of American law in lieu of the Spanish Civil Law. To attempt to establish legislative intent in connection with the provisions under consideration is quite useless. When the Civil Code was adopted in 1933 Guam was largely an agrarian community. By present standards there were few automobiles. The city of Agana was the capital and possibly over fifty per cent of the island population resided there. Guam was divided into about 14 municipalities covering an area of roughly 225 square miles. The business, governmental, social

and cultural center was Agana. Agana was almost completely destroyed during World War II and while after the war the United States Navy, as the governing authority, laid out a model city, property line disputes were not resolved and many postwar businesses and residences were located at other places accessible by modern highways. Agana ceased to have the dominating importance it had before the war, and the plaintiff in this case can carry on its business in any part of Guam with an ease unknown when the codes were adopted.

To attempt by analysis to compare Guam and California is equally fruitless. If the defendant had entered into a similar contract in California he could be restrained from violating that contract in an area larger than Guam and containing many times its population.

The plaintiff paid a large consideration for what it bought. The intent of the parties is clear. The type of business involved is not a common one. Others than the defendant can engage in it if they so desire and can make the investment required. The Guam code contemplates that such restraints as those contained in the agreement are valid within the limitations prescribed. The court holds that the word "district" can properly be construed in Guam as meaning any area the parties agree upon; that in the circumstances of this case the defendant should be enjoined from violating his agreement in the territory of Guam. To hold otherwise would permit the defendant to violate his agreement without serving any useful public purpose since changed

conditions make it impossible for the court to attempt to define an area other than that agreed upon by the parties.

The parties did not provide either for attorney's fees or for liquidated damages for breach of the agreement. This court must follow the general rule that in the absence of any contractual or statutory liability therefor, attorneys' fees in a case of this type cannot be recovered, 15 Am. Jur. 550; *Standard Accident Ins. Co. of Detroit v. Hull*, 91 F. Supp. 65.

The parties have stipulated that the plaintiff is unable to prove an actual monetary loss as a result of the defendant's breach, hence only nominal damages may be recovered, 15 Am. Jur. 392. Such damages are awarded in the amount of one dollar and costs of suit. Plaintiff's attorneys shall prepare a decree in accordance with this opinion and settle within 20 days. The amount being held in the registry of the court, less damages and costs, shall be held pending the disposition of an order to show cause for violation of the temporary injunction previously issued. Such temporary injunction shall continue in effect until the final decree is entered.

Dated and entered this 9th day of December, A.D. 1954.

/s/ PAUL D. SHRIVER,
Judge.

[Endorsed]: Filed December 9, 1954.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between counsel for plaintiff and defendant, that Four Thousand Dollars (\$4,000.00) of the amount deposited by the plaintiff with the Court, may be immediately disbursed to the defendant.

Dated: December 14th, 1954.

/s/ ROBERT E. DUFFY,
TURNER & STEVENS,

By /s/ LYLE H. TURNER,
Attorneys for Defendant.

So Ordered December 14, 1954.

/s/ PAUL D. SHRIVER,
Judge.

Check No. 4607—

[Endorsed]: Filed December 14, 1954.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between counsel for plaintiff and defendant that the order to show cause issued by the court on the 9th day of December, 1954, to the defendant may be vacated and the motion for order to show cause filed herein by the

plaintiff on the 8th day of December, 1954, be withdrawn.

Dated: Agana, Guam, this 22nd day of December, 1954.

/s/ ROBERT E. DUFFY,
Attorney for Plaintiff.

TURNER & STEVENS,
By /s/ LYLE H. TURNER.

Approved:

/s/ PAUL D. SHRIVER,
Judge, District Court of
Guam.

[Endorsed]: Filed December 22, 1954.

District Court of Guam, Territory of Guam,
Marianas Islands

Civil Case No. 47-54

GUAM SERVICE GAMES, a Co-Partnership,
Plaintiff,

vs.

AUSTIN J. SHELTON,

Defendant.

JUDGMENT

An Now, on this 22nd day of December, 1954, the above-entitled cause came on for hearing by the Court without a jury and upon a Stipulation of Facts entered into on October 25, 1954, by the parties hereto, and the Court having considered

said facts, as stipulated, and the brief of the Plaintiff and of the Defendant heretofore filed herein, and being now fully advised in the premises, and having heretofore filed herein its written Opinion, it is hereby

Ordered, Adjudged and Decreed that Plaintiff recover of and from the Defendant, for damages, the sum of One (\$1.00) Dollar, and costs of suit in the sum of One Hundred Thirty-five (\$135.00) Dollars.

It Is Further Ordered, Adjudged and Decreed by the Court that the Defendant, Austin J. Shelton, be and he is hereby enjoined from engaging in the coin-operated machine business in the Territory of Guam, in any manner or form whatsoever, whether as owner, partner, agent, employee, or otherwise, except as an employee of Plaintiff, for a period of time extending to and including January 31, 1959, provided that Plaintiff, or its successors or assigns, is engaged in such business in the Territory of Guam.

Entered this 22nd day of December, 1954.

/s/ PAUL D. SHRIVER,
Judge, District Court of
Guam.

Approved as to form and amount of costs.

TURNER & STEVENS,
By /s/ LYLE H. TURNER,
Attorney for Defendant,
Austin J. Shelton.

[Endorsed]: Filed December 22, 1954.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by the parties hereto that defendant herein be, and he is hereby entitled to withdraw from the District Court of Guam any and all monies previously deposited therein by the above-named defendant, and specifically the sum of \$1,000.00 previously deposited.

Dated: Agana, Guam, this 22nd day of December, 1954.

/s/ ROBERT E. DUFFY,
Attorney for Plaintiff.

TURNER & STEVENS,
By /s/ LYLE H. TURNER,
Attorney for Defendant.

Approved:

/s/ PAUL D. SHRIVER,
Judge District Court of Guam.

[Endorsed]: Filed December 23, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Austin J. Shelton, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit

from the final Judgment entered in this action on the 22nd day of December, 1954.

Dated: January 11, 1955.

SPIEGEL, TURNER &
STEVENS,
By /s/ LYLE H. TURNER,
Attorneys for Appellant.

[Endorsed]: Filed January 11, 1955.

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME

Court is respectfully moved to extend the time for the defendant to file herein his designation on points of appeal and the record to be transcribed, until and including the 30th day of March, 1955.

Dated: Agaña, Guam, the 18th day of February, 1955.

TURNER & STEVENS,
By /s/ RUSSELL L. STEVENS,
Attorneys for Defendant.

[Endorsed]: Filed February 18, 1955.

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME

Upon Motion of counsel for defendant, and the court being fully advised in the premises, it is hereby

ordered, adjudged and decreed that the defendant may and he does have until and including March 30, 1955, in which to file herein his designation on points of appeal and the record to be transcribed.

Dated: Agana, Guam, the 18th day of February, 1955.

/s/ PAUL D. SHRIVER,
Judge, District Court of
Guam.

[Endorsed]: Filed February 18, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS

Defendant-appellant herewith presents the points upon which he claims the court erred:

1. The court erred in holding the provision of the contract between the parties restraining defendant from engaging in the coin operated machines business in Guam, for a period of five years to be valid and legal.

2. The court erred in awarding payment of attorney's fees or other than nominal damages to plaintiff.

3. The judgment and conclusion of law are contrary to the stipulations of fact.

Dated: Agana, Guam, the 30th day of March, 1955.

SPIEGEL, TURNER &
STEVENS,By /s/ RUSSELL L. STEVENS,
Attorneys for Appellant.

[Endorsed]: Filed March 30, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Roland A. Gillette, Clerk of the District Court of Guam, for the Territory of Guam, M. I., do hereby certify that the following documents, to wit:

1. Complaint, Filed July 23, 1954.
2. Motion and Notice of Motion With Affidavit of Floyd G. Blake Attached Thereto, Filed July 29, 1954.
3. Motion and Notice of Motion, Filed August 11, 1954.
4. Appearance and Answer, Filed August 14, 1954.
5. Motion for Disqualification of Judge, Filed August 16, 1954.
6. Order of Injunction, Filed August 19, 1954.
7. Order on Motion to Disqualify, Filed August 30, 1954.
8. Pretrial Order, Filed September 14, 1954.
9. Substitution of Attorney, Filed October 13, 1954.
10. Stipulation of Facts, Filed October 25, 1954.
11. Brief of Plaintiff, Filed November 27, 1954.

12. Defendant's Reply Brief, Filed December 7, 1954.
13. Motion for Show Cause Order, Filed December 8, 1954.
14. Order to Show Cause, Filed December 9, 1954.
15. Opinion, Filed December 9, 1954.
16. Stipulation, Filed December 14, 1954.
17. Stipulation, Filed December 22, 1954.
18. Judgment, Entered and Filed December 22, 1954.
19. Stipulation, Filed December 23, 1954.
20. Notice of Appeal, Filed January 11, 1955.
21. Motion for Extension of Time, Filed February 18, 1955.
22. Order for Extension of Time, Filed February 18, 1955.
23. Statement of Points, Filed March 30, 1955.
24. Designation of Record on Appeal, Filed March 30, 1955.
25. Plaintiff's Exhibits Nos. I, II, III, IV, V, VI and VII are the Original Documents Filed in the Office of the Clerk of the District Court of Guam, in the above-entitled case.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of the aforesaid court at Agana, Guam, M. I., this 30th day of March, A.D., 1955.

[Seal] /s/ ROLAND A. GILLETTE.

[Endorsed]: No. 14719. United States Court of Appeals for the Ninth Circuit. Austin J. Shelton, Appellant, vs. Guam Service Games, a Co-partnership, Appellee. Transcript of Record. Appeal from the District Court, District of Guam, Territory of Guam.

Filed April 7, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

No. 14719

AUSTIN J. SHELTON,

Appellant,

vs.

GUAM SERVICE GAMES, a Co-Partnership,

Appellee.

APPELLANT'S STATEMENT OF POINTS ON
WHICH HE INTENDS TO RELY ON AP-
PEAL AND DESIGNATION OF RECORD
IN SUPPORT THEREOF

Comes now Austin J. Shelton, appellant above named, through his undersigned attorneys, and, pursuant to Rule 17 (6) of the above-entitled Court, makes this, his statement of points on which he intends to rely on appeal, as follows:

1. The Trial Court erred in holding that the provision of the contract between the parties restraining appellant from engaging in the coin-operated machine business in Guam for a period of five (5) years was valid and binding on appellant.

2. The Trial Court erred in enjoining appellant from engaging in the coin-operated machine business in the entire Territory of Guam; that the restraint, geographically, went beyond the intents of the parties and the limits allowed by the applicable law.

3. That the Trial Court erred in holding that appellant had breached his agreement with appellee.

4. That the Trial Court erred in entering Judgment against appellant, for if appellant breached his agreement, the said breach was thereafter cured.

Appellant, in support of each and all of the foregoing points, designates all of the record in this case certified to the above-entitled Court by the Clerk of the District Court of Guam, for the Territory of Guam.

Dated: April 14, 1955.

SPIEGEL, TURNER &
STEVENS,

By /s/ ALBERT A. SPIEGEL,
Attorneys for Appellant.

[Endorsed]: Filed April 15, 1955.

